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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1963

No. 1019

LESTER WEBSTER; CARL BRUTSCHE; HARRY FAIRBANKS; CARL J. WILLIAMS; HAROLD E. MOON; ELISHA NUTTER; JOHN G. LACKEY; KENNETH A. SCOTT; EUGENE BILLIET; LEONARD JOHNSON; DONALD STOCKS and DONALD SHOPP,

Petitioners,

vs.

MIDLAND ELECTRIC COAL CORPORATION, a Corporation; MARTHA TERLEKE, ACTING SECRETARY OF THE ILLINOIS COAL OPERATORS ASSOCIATION; THOMAS KENNEDY AS PRESIDENT OF THE INTERNATIONAL UNION UNITED MINE WORKERS OF AMERICA; JOHN OWENS AS SECRETARY-TREASURER OF THE INTERNATIONAL UNION UNITED MINE WORKERS OF AMERICA; HUGH WHITE AS PRESIDENT OF DISTRICT 12 UNITED MINE WORKERS OF AMERICA; WILLIAM SEARS AS PRESIDENT OF LOCAL UNION 1904 UNITED MINE WORKERS OF AMERICA; and THOMAS NOWERS AS SECRETARY OF LOCAL UNION 1904, UNITED MINE WORKERS OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT

KEVIN D. KELLY,
208 Marquette Street,
LaSalle, Illinois.

SIDNEY Z. KARASIK,
135 S. LaSalle Street,
Chicago 3, Illinois.

Attorneys for Petitioners.

Midwest Law Printing Co., 326 N. Michigan Ave., Chicago
Telephone: Financial 6-3988

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT

Petitioners pray that a Writ of Certiorari issue to review a judgment of the Appellate Court of Illinois, Second District.

OPINION BELOW.

The opinion of the Appellate Court (an intermediate appellate court in Illinois) is reported in 43 Ill. App. 2d 359, 193 N.E. 2d 212, and is quoted in full in the Appendix hereto.

The Supreme Court of Illinois denied leave to appeal on January 21, 1964 (App. 14a).

JURISDICTION.

Jurisdiction of this Court is invoked under 28 USC 1257 (3).

QUESTIONS PRESENTED.

Are state courts pre-empted from jurisdiction by the National Labor Relations Board in considering a suit brought by twelve coal miners to enforce claimed seniority rights under a collective bargaining agreement?

Do members of a union, who have been injured by their employer's alleged breach of a collective bargaining agreement, which breach is allegedly made in concert with certain union officials, have a right to resort to the courts for an interpretation of the agreement?

In the face of a demonstrated negative attitude by defendants, making "patently useless" further steps in the grievance procedure set up by the collective bargaining agreement, and leaving plaintiffs bereft of an effective remedy, did the Illinois court stretch the "exhaustion" rule beyond reasonable limits so as to deprive plaintiffs of due process?

THE FEDERAL STATUTES INVOLVED.

The statutory provisions involved are Sections 7 and 8 of the National Labor Relations Act, as amended, 29 U.S.C. §§ 157-158; and Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185.

STATEMENT.

Petitioners are twelve coal miners who sued their former employer for allegedly laying them off in violation of claimed seniority rights embodied in a certain collective bargaining agreement known as the National Bituminous Coal Wage Agreement.(*)

(*) The pertinent provisions of the National Agreement are:

"Section 2—In all cases where the working force is to be reduced, employees in each job classification at the mine with the least service, shall be laid off first.

Section 3—Employees who are idle because of a reduction in the working force shall be placed in a panel from which they shall be returned to employment on the basis of seniority." (A. 4)

In December, 1959, the Illinois Coal Operators Association, and District 12 published an interpretation of Sections 2 and 3 of the National Agreement. The interpretation was issued to clarify what seniority was to act as a basis as to layoffs and recall to employment. The text of the interpretation is as follows:

"With reference to paragraph 2, it has been jointly interpreted that this clause means *where there is a reduction of the working force in any classification, the youngest man in the point of Mine Payroll Seniority in that classification would be laid off first.* This means that *where there is a reduction of the working force in any classification, Mine Payroll Seniority governs, and not Classification Seniority.*

"With reference to paragraph 3, it has been jointly interpreted that when an employee is laid off and placed on the panel, he is placed on a general panel, and loses his identity as to classification or shifts regardless of the shift or the classification from which he was laid off. *The oldest man on the panel in the point of service at the mine, regardless of classification or shifts, is to be called back first,* if he is competent and qualified to fill the vacancy that might occur." (Emphasis added)

This interpretation was in effect when the layoffs occurred, which gave rise to this action. (Abst. 4, 5)

By virtue of the said interpretation, petitioners claim "mine payroll seniority"—the right of "bump-back".

Joined in the suit were certain union defendants charged with allegedly influencing, inducing or causing the employer to breach the seniority provisions of the said agreement; arbitrarily neglecting and refusing to process the grievances of the plaintiffs; and alleging further that the acts and omissions of the said union representatives "wilfully, wantonly, maliciously and arbitrarily were calculated to destroy plaintiffs' rights under the National Agreement and the [union] Constitution". (Abst. 15)

The pleadings were framed as an action for a declaratory judgment(*) and for consequential damages arising out of the alleged breach of the collective bargaining agreement. After undergoing various amendments, plaintiffs' second amended complaint, and subsequent amendments thereto, was dismissed by the trial court.

The Appellate Court of Illinois for the Second District affirmed on the principal ground that the plaintiffs did not "exhaust" all of the remedies of the grievance procedure contained in the collective bargaining agreement—notwithstanding that the plaintiffs specifically alleged that they had endeavored to take all the steps within their means to set the grievance machinery in motion to enforce their seniority claims within such procedure, that they were frustrated and rebuffed, and that further steps were "delusory and futile."

(*) Although denominated an action for a "Declaratory Judgment", it is clear that the gist of the action is for equitable relief as well as consequential damages. Cf. *International Association of Machinists* v. *Gonzales*, 356 U.S. 617. Under Illinois law declaratory relief is a "step beyond equity", or is quasi equitable relief. *Freeport Motor Casualty Co.* v. *Thorp*, 406 Ill. 295; *Burgard* v. *Mascoutah Lumber Co.*, 6 Ill. App. 2d 210; Next Step Beyond Relief, The Declaratory Action, 13 U. of Chicago L. Rev. 145.

The Appellate Court also held, as an additional ground, that the type of dispute here involved is within the *exclusive* jurisdiction of the National Labor Relations Board—citing the recent cases of this Court, *Local 100 United Association of Journeymen and Apprentices* v. *Borden*, 373 U.S. 690, and *Local 207, Ornamental Ironworkers Union* v. *Perko*, 373 U.S. 701, as authorities for the proposition that in matters "involving individual members' employment" the N.L.R.B. has exclusive jurisdiction.

The statement of the operative facts in the Appellate Court's opinion (App. 1a-13a) is adequate for an understanding of the issues herein involved.

Petition for leave to appeal was denied by the Illinois Supreme Court on January 21, 1964, without comment. (App. 14a)

REASONS FOR GRANTING THE WRIT.

I.

JURISDICTION OF THE ILLINOIS COURTS WAS NOT PRE-EMPTED BY THE NLRB.

1. The Illinois courts harbor a serious misapprehension as to the scope of the "pre-emption" doctrine and the pronouncements of this Court on the subject. The ambit of pre-emption is far from settled or its boundaries demarcated by this Court.

Between the factual situation deemed an "unfair labor practice" sufficient to invoke application of exclusive N.L.R.B. jurisdiction (*San Diego Trades Council* v. *Garmon*, 359 U.S. 236) and suit in a state court under Section 301 of the Labor Management Relations Act to vindicate an individual employee's rights under a collective bargaining agreement, (*Smith* v. *Evening News Association*, 371 U.S. 195) there are still many questions worthy of this Court's attention. It is respectfully submitted that the question raised in the instant case is one of those.

In the recent case *Humphrey* v. *Moore*, 375 U.S. 335 (Jan. 6, 1964) Mr. Justice Harlan, concurring in part and dissenting in part made an observation which surely no one on the Court would dispute:

> "The pre-emption issue is a difficult and important one, carrying ramifications extending far beyond this particular case."

2. In *Humphrey* v. *Moore*, 375 U.S. 335, plaintiff brought a class action in the state Courts of Kentucky to enjoin implementation of a joint employer-employee committee decision which "dovetailed" seniority rights of

employees of two companies with resulting jeopardy to plaintiffs' jobs. Characterizing the complaint as an action "to enforce a collective bargaining contract" the Court of Appeals for the Commonwealth of Kentucky granted the injunction at the behest of one of the laid-off employees on the ground that the "grievance settlement" made by the joint committee was beyond its arbitrable powers.

Reversing the Kentucky Court, this Court held that Moore was not entitled to the relief granted him because he had "*not proved his case*" with respect to the two contentions advanced: (1) that the joint committee's settlement was beyond the scope of their powers and (2) the decision of the joint committee "was obtained by dishonest union conduct in breach of its duty of fair representation." (p. 342)

The significance of the *Humphrey* case is that while Moore had "not proved his case," the majority opinion implicitly recognizes that he had *pleaded* a cause of action.

The Court said, at p. 344:

> "Although there are differing views on whether a violation of the duty of fair representation is an unfair labor practice under the Labor Management Relations Act, it is not necessary for us to resolve that difference here. Even if it is, or arguably may be, an unfair labor practice, the complaint here alleged that Moore's discharge would violate the contract and was therefore within the cognizance of federal and state courts, *Smith* v. *Evening News Association*, * * * subject to the applicable federal law."

Concerning seniority rights, the Court said, p. 346:

> "Seniority has become of overriding importance, and one of its major functions is to determine who gets or keeps an available job."

While there was a *failure of proof* in *Humphrey*—both on the issue of the joint committee's authority and the issue of the union representative's integrity—the sole issue presented by the instant case is whether plaintiffs have *pleaded* an action cognizable in a state court without violence to the *Garmon* pre-emption doctrine.

3. Prior to *Humphrey*, the Court has held, or expressed the view, that individual employees have standing to seek redress in a state or federal court—even though the conduct objected to also, arguably, was an "unfair labor practice" within the primary competence of the Labor Board. *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261, 268; *Syres* v. *Oil Workers International Union*, 350 U.S. 892; *Smith* v. *Evening News Association*, 371 U.S. 195; *Atkinson* v. *Sinclair Rfg. Co.*, 370 U.S. 238, 245; *Local 174, Teamsters Union* v. *Lucas Flour Co.*, 369 U.S. 95, 101; *Dowd Box Co.* v. *Courtney*, 368 U.S. 502, 513. See also *Moore* v. *Illinois Central R. Co.*, 312 U.S. 630.

The meaning and interpretation of the collective bargaining agreement in relation to the individual employee's grievance can also be a proper concern of the court—notwithstanding the purported binding effect of the arbitration mechanism set up by the collective contract itself. *Humphrey* v. *Moore*, 375 U.S. 335; *United Protected Workers of America* v. *Ford Motor Co.*, 194 F. 2d 997 (CCA 7th).

The *Humphrey* case recognizes the principle that an individual employee does have a remedy in a state court to vindicate his claimed seniority rights under a collective bargaining contract. Petitioners here are entitled to a trial on their pleadings and the issues raised by respondents' counter-affidavits, that their "mine-payroll senior-

ity" was flouted in the face of the previously accepted interpretation by the Illinois Coal Operators Association of the National Agreement; and on the further issue that the union defendants acted in a manner breaching their duty of fair representation.

4. While the employment contract in *Smith* v. *Evening News*, 371 U.S. 195 did not involve a grievance arbitration procedure which had to be exhausted before resort to the courts, the Court rejected the contentions of the defendant that under Section 301 of the Labor-Management Relations Act, only the Labor Board had exclusive jurisdiction. The court said, at p. 197:

> "The authority of the Board to deal with an unfair labor practice which also violates a collective bargaining contract, is not displaced by Section 301, but it is not exclusive and does not destroy the jurisdiction of the courts in suits under Section 301. If, as respondent strongly urges, there are situations in which serious problems will arise for both the courts and the Board having jurisdiction over acts which amount to an unfair labor practice, *we shall face those cases when they arise*. This is not one of them, in our view, and the National Labor Relations Board is in accord." (The view being contained in the *amicus curiae* brief filed by the Solicitor General to the effect that "ousting the courts of jurisdiction under Section 301 * * * would not only fail to promote, but would actually obstruct, the purposes of the Labor Management Relations Act.") (p. 198) (Emphasis added).

5. *Local 100, United Association of Journeymen and Apprentices* v. *Borden*, 373 U.S. 690, and *Local 207, Ornamental Ironworkers Union* v. *Perko*, 373 U.S. 701, are cited by the Illinois court below for the proposition that "the National Labor Relations Board jurisdiction in matter involving individual members' employment, pre-empts court jurisdiction."

The two cases are distinguishable from the instant case. *Borden* holds that an action by union member against his local for failure to clear him for a job may have been due to his failure to comply with the internal union rules, that such conduct "arguably" violates Section 8 (b) (1) (A) of the National Labor Relations Act (an unfair labor practice) and hence within the exclusive province of the Labor Board. The court distinguishes *International Association of Machinists* v. *Gonzales*, 356 U.S. 617, by the fact that that action was primarily an "equity case"—as is the instant case—in which damages were sought to "fill out" the plaintiff union member's remedy, whereas in *Borden*, no specific equitable remedy was sought.

Similarly, in *Perko*, decided simultaneously with *Borden*, the Court holds that the alleged action of the defendant union in "conspiring" to interfere with plaintiff's existing or prospective employment was likewise an unfair labor practice cognizable under the said section of the National Labor Relations Act.

In *Borden*, the Court said at p. 694:

> "The first inquiry in any case in which a case of federal pre-emption is raised, must be whether the conduct called in question be reasonably asserted to be subject to Labor Board cognizance."

Examination of Sections 7 and 8, the National Labor Relations Act(*) discloses that by no stretch of construc-

(*) The relevant provisions of Sections 7 and 8 may be summarized as follows:

Sec. 7 is concerned with rights of employees to self-organization (to form unions) and to bargain collectively.

Sec. 8 defines "unfair labor practices" as follows:

a. On the part of employer—

(1) Interfering with rights of employees under Sec. 7;

(2) Interfering with formation of a labor organization;

tion is it "arguable" that the issues in the instant case fall within the range of those sections.

6. In *International Union, United Automobile Aircraft and Agricultural Implement Workers of America (UAW-CIO) et al.* v. *Russell*, 357 U.S. 944, the plaintiff sought damages arising from the action of his union in preventing him from employment under his labor contract. In examining the question of a possible conflict of jurisdiction between state courts and the National Labor Relations Board the Court said:

> "In this case there is a possibility that *both* the Board and the state courts have jurisdiction to award lost pay. However, that possibility does not create the kind of "conflict" of remedies referred to (*United Construction Workers* v. *LaBurnum Corp.*, 347 U.S. 656) Our cases which hold that state jurisdiction is preempted are distinguishable. *In them we have been concerned lest one forum would enjoin, as illegal, conduct which the other forum would find legal, or that the State courts would restrict the exercise of rights guaranteed by the Federal Acts.*" (Emphasis added)

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(3) Discrimination in regard to employment with intent to influence membership in a union;
(4) * * *
(5) To refuse to bargain collectively;

b. On the part of a labor organization—
(1) To restrain or coerce employees in their right to organize and join a labor organization;
(2) To discriminate against an employee whose membership in the union has been terminated or denied, or to attempt to cause an employer to discriminate against an employee by coercing union membership;
(3) To refuse to bargain collectively with an employer;
(4) To engage in or to induce strikes where the object is to force joining or recognition of the union;
(5) To require excessive or discriminatory initiation fees;
(6) To cause an employer to pay for services not performed.
(Tit. 29, USC §§ 157-158)

In short pre-emption applies where conflict between the national and state jurisdictions are imminent or probable. The issues raised by the instant case present no such conflict.

II.

THE EXHAUSTION-OF-REMEDIES RULE WAS MISAPPLIED BY THE ILLINOIS COURT.

1. In 1957 the Illinois Appellate Court observed in *Payne* v. *The Pullman Co.*, 13 Ill. App. 2d 105, at p. 111,

> "While the doctrine of exhaustion remedies is well established in Illinois, our Supreme Court has never specifically passed upon it in an employer-employee dispute."

The Illinois Supreme Court to this date has still not specifically passed upon this doctrine in an employer-employee case.

2. As its principal ground for affirming dismissal of petitioners' suit below, the Appellate Court said, "Before a member of a union or association brings suit and it appears that his remedies are governed by laws or regulations, he must first show that he has exhausted all other remedies provided." (App. 10a)

Petitioners do not dispute this familiar principle but sharply take exception to the court's conclusion "that (plaintiffs) have failed to exhaust the remedies under both the National Agreement and the Constitution of the United Mine Workers of America." (App. 10a)

The record shows that in respect to the five steps of the grievance arbitration procedure embodied in the National Bituminous Wage Agreement of 1950(*) plaintiffs

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(*) "Should differences arise between the Mine Workers and the Operators as to the meaning and application of the provisions of this Agreement, or should differences arise about matters not specifically mentioned in this Agreement, or should any local trouble of any kind arise at the mine, an earnest effort shall be made to settle such differences immediately:

"1. Between the aggrieved parties and the mine management.

"2. Through the management of the mine and the Mine Committee.

"3. Through District Representatives of the United Mine Workers of America and a commissioner representative (where employed) of the coal company.

"4. By a board consisting of four members, two of whom shall be designated by the Mine Workers and two by the Operators.

"5. Should the board fail to agree, the matter shall, within thirty (30) days after decision by the board, be referred to an umpire to be mutually agreed upon by the Operator or Operators affected, and by the duly designated representatives of the United Mine Workers of America, and the umpire so agreed upon shall expeditiously and without delay decide the said case. The decision of the umpire shall be final. • • •

"A decision reached at any stage of the proceedings above outlined shall be binding on both parties hereto and shall not be subject to reopening by any other party or branch of either association except by mutual agreement." (Abst. 42-43)

exhausted all of the remedies practicably available to them and that any other steps were beyond their power.(**)

(**) Step 1 was taken by the plaintiffs, as alleged in paragraph 13 of their Second Amended Complaint, when requests were made by the plaintiffs to the company mine superintendent, McAfee to reinstate them to their jobs in accordance with their claimed seniority rights, which request was flatly refused. (A. 7)

Step 2 was taken, as alleged in paragraphs 13 and 14 of their Second Amended Complaint, when plaintiffs requested and obtained a meeting of the grievance board at the Local and District levels and the Mine Management, in an effort to adjust the grievance of the plaintiffs and to restore them to their jobs. (A. 7, 8) It is alleged that at said meeting with the employer and the representatives of the District and Local denied plaintiffs' complaint and informed plaintiffs that no action would be taken for them. (A. 7, 8)

Within one month of their lay-off, plaintiffs allege that at a meeting attended by various Locals of District 12, attended by authorized representatives of the International Union of the United Mine Workers of America, plaintiffs again sought to air their alleged wrongful layoff in violation of their seniority rights, to take necessary action to require the Midland Electric Coal Company to reinstate plaintiffs to their rightful jobs, and that plaintiffs were told at that meeting that no action would be taken in their behalf. (par. 14a of Second Amended Complaint, A. 45)

Step No. 3 requires action through District Representatives of the Union, and a Commissioner representative of the coal company. It is plain from this provision that only a District representative and a commissioner representative can act at this level. Since the District representative of District 12 had already denied plaintiffs' complaint and had categorically informed them that their complaint would not be processed, there was nothing further that plaintiffs could do under this step of the grievance procedure.

Similarly, step 5 could only become operative if step 4 were invoked by the District representative and the Company. "Finality" of the umpire's decision is meaningful only if the prior steps are taken leading to the appointment of the umpire. Further, the umpire's decision would be binding only where he has settled the dispute. No umpire was appointed and the dispute was not settled.

The very fact that, as the court states, in the instant case Midland, International Union, District 12 and Local 1904 all took the position that plaintiffs' layoffs were consistent with the existing seniority regulations under the National Agreement (App. 11a) indicates that further steps after Step 2 could not be taken.

Significantly, the Illinois court is careful not to say that petitioners are precluded from resorting to the courts to resolve the meaning of the "seniority" provisions of the National Agreement merely because the employer and the union officials construed the existing seniority regulations adversely to petitioners. The appellate court cites this circumstance only to negative petitioners' contention that the employer "refused to participate * * * in any of the procedures provided for the settlement of local and district disputes under the National Agreement." (App. 11a)

Whether or not such "participation" does negative petitioners' argument, the correct interpretation of the seniority provisions of the National Agreement remains a grievance which petitioners were unable to process, in the manner provided, beyond Step 2—after which they had to go to court.

Although the appellate court finds a "shortcoming" in petitioners' efforts to exhaust the remedies of the grievance arbitration procedure—it is not on the part of petitioners. In view of the demonstrated attitude of the union and employer regarding petitioners' grievance, it is impossible to perceive what other steps in the procedure they could have practicably taken. The appellate court does not specify.

The court goes on to say:

> "Briefly summed up, it may be said that plaintiffs' efforts insofar as they went were informal and ineffective. The defendants are entitled to the benefit of some formality provided by the National Agreement and the Constitution." (App. 12a)

The "ineffectiveness" of plaintiffs' efforts is not the fault of the plaintiffs. The "informality" of their efforts was not in violation of anything in the National Agreement or the Constitution: *Nothing therein specifies the filing of any written complaint or documents.*

It would be manifestly unrealistic to expect aggrieved coal miners to file written, "formal" complaints or pleadings in the manner of lawyers, in order to have their grievances processed. It is more in keeping with the realities of the situation that the plaintiffs pressed their complaint in person at every opportunity—with the mine superintendent, with the representatives of their local, district union, and International—not once, but repeatedly and vigorously, as men fighting for their bread, would. The National Agreement and the union's constitution requires no more.

2. Where pursuit of administrative remedies would be "illusory and futile" the courts have recognized an exception to the exhaustion-of-remedies rule. *Anson* v. *Hiram Walker & Sons*, 222 F. 2d 100 (CCA 7 1955); *United Protective Workers of America* v. *Ford Motor Co.*, 194 F. 2d 997.

In *Kopke* v. *Ranney*, 16 Wis. 2d 369, 114 NW 2d 485 (1962), Wisconsin Supreme Court, said at p. 487:

> "The rule requiring exhaustion of so-called internal remedies is subject to exceptions, principally where it appears that a similar remedy afforded within the union *would probably be futile* or involve inordinate delay." (emphasis added)

Under the circumstances of the instant record where the complaint charges the union defendants with wilful, wanton, malicious and arbitrary acts and omissions "intended and calculated to destroy plaintiff's rights through and under the National Agreement and the (union) constitution"

(A. 15), petitioners would have long exhausted themselves before they could exhaust the grievance procedure.(*)

4. The Illinois court observes that "plaintiffs' only complaint against the union defendant is that they have refused to process their complaint against Midland. This the union may ordinarily do (*Ostrofsky* v. *United Steelworkers of America*, 171 F. 2d 82)". (App. 11a).

But even in the *Ostrofsky* case the Court said p. 794:

> "Our Court has repeatedly held that proper exercise of such discretion over grievance and interpretation of contract terms in the interest of all its members is vested in authorized representatives of the union, subject to challenge, only on grounds of *bad faith, arbitrary action or fraud*". (Emphasis added)

The facts and allegations set up in the instant complaint, challenging the improper exercise of the discretion by the union defendants, is tantamount to a pleading of "bad faith" without the label, and explicitly charges "arbitrary" action.

5. Broad as is the authority of the union as the exclusive bargaining agent in the administration of their collective bargaining contract, there is a concomittant re-

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(*) In 50 NW. L. Rev. 43, Report of the Committee on Implementation of Administration of Union Management Agreements 1954, the committee discusses the problem of the standing of an individual employee to sue on a collective bargaining contract. Taking up the requirement that the "grievance procedure be exhausted", at p. 160 the committee remarks:

> "If the grievance procedure provides for arbitration, he may find himself trapped in a box canyon. The court can provide an escape on holding that he need not exhaust procedures *which are either useless or unavailable*," citing *United Protective Workers of America* v. *Ford Motor Co.*, 194 F. 2d 997 (CCA 7, 1962) and other cases (Emphasis added).

sponsibility and duty of fair representation. Where, as here, union defendants are alleged to have breached their duty of fair representation and to have arbitrarily refused to process petitioners' grievances, the individual employees have a right to a remedy in the courts without bar of the "exhaustion-of-remedies rule." *Syres v. Oil Workers International Union*, 350 U.S. 892. Insistence upon the exhaustion doctrine in the face of its pleaded futility, and casting petitioners out of court, is a manifest deprival of due process.

CONCLUSION.

The plight of the twelve coal miners here fighting for their seniority rights and jobs, is undoubtedly common to hundreds and thousands in the coal fields of Illinois and elsewhere. The importance of the case transcends the immediate litigants and merits the attention of this Court.

Respectfully submitted,

KEVIN D. KELLY and
SIDNEY Z. KARASIK,
Attorneys for Petitioners.

APPENDIX A.

OPINION OF THE APPELLATE COURT

SPIVEY—J.

Plaintiffs' appeal from an order of the Circuit Court of Henry County dismissing their suit for declaratory judgment and incidental relief for damages.

Plaintiffs are twelve employees of Midland Electric Coal Corporation, hereinafter referred to as Midland; and members of The International Union United Mine Workers of America, hereinafter referred to as International Union; District 12 United Mine Workers of America, hereinafter referred to as District 12; and Local Union 1904 United Mine Workers of America, hereinafter referred to as Local 1904.

The original complaint was filed as an action at law for damages against Midland and its superintendent for allegedly discharging plaintiffs in violation of a local seniority agreement and against certain union defendants for allegedly influencing, including, or causing Midland to breach said agreement. After motions to quash summons and to dismiss the complaint had been filed, but before any hearing thereon, plaintiffs filed an amended complaint in chancery. This amended complaint was further amended on February 15, 1961, and as amended, charged that Midland had discharged plaintiffs in violation of said local agreement and the National Bituminous Coal Wage Agreement and asked that Midland account to them for wages and monetary benefits lost, for further damages, including punitive damages and for equitable relief including the reinstatement of plaintiffs in their former positions. The plaintiffs further charged that the union defendants refused to

take the necessary steps to redress plaintiffs' grievances and asked that they be required to take such steps, desist from an alleged violation of the National Bituminous Coal Wage Agreement and to pay damages, including punitive damages.

Defendants' motions to dismiss the amended complaint were sustained. Plaintiffs then filed the aforesaid declaratory judgment action as their second amended complaint which was designated as a class action with respect to the Union defendants.

The second amended complaint after all amendments thereto, charged Midland with an unlawful violation of the seniority provisions of a written collective bargaining agreement known as the National Bituminous Coal Wage Agreement, dated March 5, 1950, as amended; hereinafter referred to as National Agreement.

This complaint further charged the International Union, District 12 and Local 1904 all of which are unincorporated associations, with failure to process their grievances, which failure, they allege to be in violation of their obligations under the National Agreement and the constitution of the United Mine Workers of America, hereinafter referred to as the Constitution.

This complaint in additional counts charged the same defendants with wilfully, wantonly, maliciously and arbitrarily doing the same acts or omissions and prayed for the imposition of punitive or exemplary damages.

The second amended complaint, in addition to other matters, alleged that prior to the commencement of this action they had performed all of the necessary conditions precedent under the terms of the National Agreement and the Constitution, "which were not illusory and futile."

(Appellate Court Opinion)

Plaintiffs in their brief and argument with reference to their exhaustion of the remedies required by the National Agreement and the Constitution state that the second amended complaint together with supporting affidavits show that a few days before their lay-off, plaintiff Fairbanks had a conversation with James MacAffee, Superintendent of Midland, relative to the pending lay-off of some of the older men with greater seniority, contrary to the provisions of a superseded local agreement at which time MacAffee told Fairbanks that Midland could no longer operate profitably under the old local agreement. On or about February 12, 1960, Fairbanks was accosted by MacAffee and told that he and some of the older men were being layed off, whereupon Fairbanks protested, and pointed out that such contemplated lay-off was contrary to the contract. Plaintiffs were layed off for the reasons of slow down in production and lack of work on or about February 25, 1960. It is further stated that plaintiffs Moon and Williams, when advised of their lay-off, complained to MacAffee of a violation of the seniority provisions of their employment and MacAffee told them that the action of the company was final and that their lay-off was in accordance with the contract.

Certain of the plaintiffs then asked William Sears, president of Local 1904, to enforce their seniority rights and were told by Sears to go back and see MacAffee. MacAffee is said to have again told them there was nothing that could be done about their lay-off. A few days later at a regular meeting of Local 1904 attended by some of the plaintiffs on behalf of themselves and the other plaintiffs, the question of their lay-off was brought to the floor of the meeting and a request made of Thomas Nowers and William Sears, officers of the Local Union to process their claimed contract

violation through regular grievance channels. Sears and Nowers told them that Midland was following the National Agreement, action would be useless, and that they would not process their complaint.

Continuing it is said that about a week later, at plaintiffs' request, a meeting of the Joint Grievance Committee was held at the mine office of Midland and that Moon and Williams attended along with Herman Lisse, District 12 Grievance Committee Member, Henry Nowers, Management Representative for the Mine, James MacAffee, Superintendent of the Mine, and Bill Duryea, James Mohler and Vern Mineart, representing labor. Moon and Williams protested the violation of the seniority provisions of the contract and asked the Joint Grievance Committee to set up a case on their complaint, and they were advised they did not have a case and that they would not write up a complaint or take any action to process their claim.

Lastly it is said that in May of 1960 a District 12 meeting was held to consider an appeal from the failure of action on the part of Local 1904 and the Joint Grievance Committee. Attending were Herman Lisse and Joseph Shannon, District 12 Executive Board Members, Lisse also being a member of District 12 Grievance Board and Shannon also being a member of the Grievance Board of the International Union, and, plaintiffs Brutsche, Williams, Moon, and Fairbanks on their behalf and on behalf of the other plaintiffs. Plaintiffs' grievances were brought to the floor of the meeting and a request made of the presiding officer to process their complaint. Following deliberation by the District 12 Executive Board they were informed that nothing could be done, and thereafter Shannon was requested to take action which he refused to do.

(Appellate Court Opinion)

Midland moved to dismiss the second amended complaint and among other things alleged that the court lacked jurisdiction in that the plaintiffs had not exhausted their administrative remedies provided in the collective bargaining agreement.

The International Union, District 12, and Local 1904 moved to dismiss the second amended complaint and stated, inter alia, that plaintiffs had failed to exhaust the provisions for adjustment and settlement of grievances provided by its Constitution, and that plaintiffs had failed to exhaust or invoke the grievance procedures provided in the National Agreement.

Defendants' motions were supported by affidavits, the pertinent parts to our decision are that the records of the secretary-treasurer of District 12 disclose that none of the plaintiffs have ever filed or made any complaint, grievance or charge against the International Union, District 12, or Local 1904 as authorized by the Constitution, nor have they ever made or filed with the National Labor Relations Board, nor with any agent or agency thereof, any such complaint, grievance or charge. The books and records of Midland disclose that each of the plaintiffs was layed off because of a reduction in the working force except Leonard Johnson who is not and has never been employed by Midland at the mine, and no complaint, grievance or charge has been filed with Midland by or on behalf of the Plaintiffs and no effort has been made by any of the plaintiffs under the grievance procedure outlined in the collective bargaining agreement.

In addition the affidavits set forth certain provisions of the National Agreement, the Constitution and other relevant matters.

(Appellate Court Opinion)

Provisions of the Constitution of the United Mine Workers of America germane to this decision provide:

"Article III.

"Section 1. * * * The International Union shall have supreme legislative, executive and judicial authority over all members and subordinate branches, and shall be the ultimate tribunal to which all matters of importance to the welfare of the membership and subordinate branches shall be referred for adjustment. * * *

"Sec. 3. In all questions of dispute, appeals and grievances (unless restricted by joint agreement) the right of appeal of an individual member shall end with the District Executive Board, and the right of appeal of any branch of the Organization shall end with the International Executive Board. This shall not prevent individuals whose membership is at stake from appealing to the International Executive Board, which body's decision shall be final and binding unless reversed by the International Convention. When an appeal is taken, the defendants must be furnished a copy of the appeal in ample time to prepare their case. In all cases the decision of the subordinate tribunal must be complied with before the appellant's right of appeal shall be recognized. However, the appellant shall have the right of appeal provided bond satisfactory to the court of appeal covering the amount of money involved is furnished."

"Article XVIII.

"Section 1. When an officer of the Organization other than local is charged with official delinquency or malfeasance, other than as to the particular offenses described in Section 7 of this Article, the charge must

be lodged with the Executive Board of the branch of which he is an officer and the decision of said Executive Board shall close the case insofar as such tribunal is concerned, but should the accused or his accuser be dissatisfied with the decision of the tribunal first trying the case, either shall have the right of appeal to the next highest tribunal in authority and so on until a final decision is reached, as provided in Section 3 of Arficle III.

"Section 2. When any Local officer or any member not an officer is accused of violating any of the Organization's laws or any transgression against the Organization or any of its officers or members, other than as to the particular offenses described in Section 7 of this Article, the charge must be first lodged with and prosecuted before the Local Union of which the alleged offender is a member and the decision of the Local Union shall close the case so far as that tribunal is concerned, but should the accused or his accuser be dissatisfied with the decision of the tribunal first trying the case, either shall have the right of appeal to the next highest tribunal in authority and so on until a final decision is reached, as provided in Section 3 of Article III, except as otherwise provided in this Constitution.

"Article XXI

"Sec. 9. Any member of the Organization who resorts to the civil courts to secure redress of an alleged wrong done him by the Organization before exhausting his rights in the courts of the United Mine Workers of America, shall be expelled from the Organization and shall not be reinstated until the suit entered in the civil courts is withdrawn.

(Appellate Court Opinion)

Pertinent provisions of the National Agreement provide:

"Miscellaneous.

"3. The United Mine Workers of America and the Operators agree and affirm that they will maintain the integrity of this contract and that all disputes and claims which are not settled by agreement shall be settled by the machinery provided in the 'Settlement of Local and District Disputes' section of this Agreement unless national in character in which event the parties shall settle such disputes by free collective bargaining as heretofore practiced in the industry, it being the purpose of this provision to provide for the settlement of all such disputes and claims through the machinery in this contract provided and by collective bargaining without recourse to the courts.

"Seniority.

"Grievances under the seniority arrangements shall be handled in the usual way under the machinery of the contract providing for the consideration and disposition of grievances."

"Settlement of Local and District Disputes.

"Should differences arise between the Mine Workers and the Operators as to the meaning and application of the provisions of this Agreement, or should differences arise about matters not specifically mentioned in this Agreement, or should any local trouble of any kind arise at the mine, an earnest effort shall be made to settle such differences immediately:

"1. Between the aggrieved party and the mine management.

"2. Through the management of the mine and the Mine Committee.

"3. Through District representatives of the United Mine Workers of America and a commissioner representative (where employed) of the coal company.

"4. By a board consisting of four members, two of whom shall be designated by the Mine Workers and two by the Operators.

"5. Should the board fail to agree the matter shall, within thirty (30) days after decision by the board, be referred to an umpire to be mutually agreed upon by the Operator or Operators affected and by the duly designated representatives of the United Mine Workers of America, and the umpire so agreed upon shall expeditiously and without delay decide said case. The decision of the umpire shall be final. Expenses and salary incident to the services of an umpire shall be paid equally by the Operator or Operators affected and by the Mine Workers.

"A decision reached at any stage of the proceedings above outlined shall be binding on both parties hereto and shall not be subject to reopening by any other party or branch of either association except by mutual agreement."

Defendants' motions to dismiss presents the question of whether or not on the basis of the allegations a proper case is presented or made out for invoking the jurisdiction of the court to make a declaratory judgment. Stated another way, does it appear that plaintiffs would be entitled to any relief if they should prove all of the facts alleged in their complaint.

(Appellate Court Opinion)

Plaintiffs are members of a voluntary unincorporated association and as such are bound by the constitution, laws, rules and regulations duly adopted by the association. (*Gratz* v. *Cozart*, 13 Ill. App. 2d 515, 142 N.E. 2d 833; *Ginossi* v. *Samatos*, 3 Ill. App. 2d 514, 123 N.E. 2d 104; *Talton* v. *Behncke*, 199 F. 2d 471.)

Their cause of action is bottomed on the National Agreement wherein the defendant unions are designated as their exclusive bargaining agent. The collective bargaining agreement negotiated on behalf of plaintiffs govern their employment and they are bound by the terms of that agreement. (*Anson* v. *Hiram Walker Co.*, 222 F. 2d 100)

While there is authority to the contrary in other jurisdictions Illinois has consistently held to the rule that before a member of a union or association brings suit and it appears that his remedies are governed by laws or regulations he must first show that he has exhausted all of the remedies provided. This rule applies to procedures outlined in the collective bargaining agreement as well as under the constitution and by laws of the union or association. (*Payne* v. *Pullman Co.*, 13 Ill. App. 2d 105, 141 N.E. 2d 83; *Long* v. *Illinois Central Railroad Co.*, 32 Ill. App. 2d 103, 176 N.E. 2d 812; *Henderson* v. *Eastern Gas and Fuel Association*, 290 F. 2d 677; *Anson* v. *Hiram Walker & Sons*, 222 F. 2d 100.)

As we have noted plaintiffs' action is predicated solely on the National Agreement, and the Constitution of the United Mine Workers of America. It is readily apparent from an examination of the record as a whole that they have failed to exhaust their remedies under both the National Agreement and the Constitution of the United Mine Workers of America.

(Appellate Court Opinion)

Obviously recognizing their shortcomings in that regard they have attempted to excuse themselves by alleging that any further pursuit of their administrative remedies would be illusory and futile.

In the instant case Midland, International Union, District 12 and Local 1904 all took the position that plaintiffs' layoffs were consistent with the existing seniority regulations under the National Agreement.

The record is absent and showing that Midland had refused to participate or indicated that they would refuse to participate in any of the procedures provided for the settlement of local and district disputes under the National Agreement. The fact that Midland participated in a meeting of the Joint Grievance Committee is inconsistent with any argument that Midland would not follow the full grievance procedure.

Midland at all times was under the duty to negotiate with the Union as the exclusive representative of plaintiffs. Any deviation from that duty would constitute a violation of the National Labor Relations Act. (*N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1; *Plasti-Line Incorporated* v. *N.L.R.B.*, 278 F. 2d 482; *Medo Photo Supply Corp.* v. *N.L.R.B.*, 321 U.S. 678.)

Plaintiffs' only complaint against the union defendants is that they have refused to process their complaints against Midland. This the union may ordinarily do. (*Ostrofsky* v. *United Steelworkers of America*, 171 F. Supp. 782). Considering the vast number of members of this Union, wide discretion must necessarily be placed in the union agents so that as a whole the membership may be best served. (*Ford Motor Company* v. *Huffman*, 345 U.S. 330.)

(Appellate Court Opinion)

Briefly summed up it may be said that plaintiffs' efforts insofar as they went were informal and ineffective. The defendants are entitled to the benefits of some formality provided by the National Agreement and the Constitution. Anything less than that would result in an impossible situation in the processing of individual members' complaints.

Plaintiffs rely on *Ledford* v. *Chicago, Milwaukee, St. Paul. Railway Company and the Brotherhood of Railroad Trainmen*, 298 Ill. App. 298, 18 N.E. 2d 568, and *United Protective Workers of America* v. *Ford Motor Company*, 194 F. 2d 997, and 223 F. 2d 49, in support of their contention that exhaustion of their administrative remedies is unnecessary if the same would be illusory and futile. Neither of these cases are controlling. In the *Ledford* case the plaintiffs' action was not based upon an employment contract nor membership in a union. They were not in fact members of the union, consequently they were not bound by a contract of employment nor the constitution of a union.

In the *Ford* case the defendant took the position that the dismissals had no connection with the collective bargaining agreement but were pursuant to a general retirement plan. Ford had refused the union's request, as bargaining representative, to follow the grievance procedure outlined in the collective bargaining agreement contending that it was not in issue.

In addition, with reference to the union defendants, very recent expressions of the Supreme Court of the United States hold that the National Labor Relations Board's jurisdiction in matters involving *individual members employment*, pre-empts court jurisdiction. (*Local 100, United As-*

sociation of Journeymen and Apprentices v. *Borden and International Association of Bridge, Structural and Ornamental Iron Workers Union* v. *Perko*, 373 U.S. 690, 83 S. Ct. 1405, 10 L. Ed. 632)

In the *Borden* and *Perko* cases the Supreme Court points out their distinction from the case of *International Assn. of Machinists* v. *Gonzales*, 356 U.S. 617. The court said that the *Gonzales* case applies to strictly internal affairs of a union not involving employment.

Plaintiffs contend that the trial court erred in continuing the taking of depositions until after hearing on motions to dismiss the second amended complaint. The order of continuance was entered on January 12, 1962, and noted the presence of counsel for the respective parties.

Supreme Court Rule 19-5(2) affords the court wide discretion in controlling and directing discovery procedures. (*Stowers* v. *Carp*, 29 Ill. App. 2d 52, 172 N.E. 2d 370.) The second amended complaint having been properly dismissed there could be no error in continuing the taking of the depositions. (*Kimball* v. *Ryan*, 283 Ill. App. 456).

In view of what has been said herein it is unnecessary to consider other points raised by the parties.

The orders of the Circuit Court of Henry County are affirmed.

Affirmed.

CROW, P. J. and WRIGHT, J. Concur

APPENDIX B.

ORDER OF THE SUPREME COURT

Be It Remembered, that, to-wit: on the 21st day of January, A.D. 1964, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said Court, had and entered of record, to-wit:

* * * (Caption No. 38290) * *

And now on this day the Court having duly considered the Petition for Leave to Appeal herein as well as the record and abstract, filed in support thereof, and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies Leave to Appeal herein.

And it is further considered by the Court that the said Respondents recover of and from the said Petitioners costs by them in this behalf expended, to be taxed, and that they have execution therefor.

I, Mrs. Earle Benjamin Searcy, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of said court this 24th day of January 1964.

(Seal)

/s/ Mrs. Earle Benjamin Searcy, Clerk, Supreme Court of the State of Illinois.

APPENDIX C.

JUDGMENT OF THE APPELLATE COURT

Be it remembered, That, to-wit: On the 14th day of October, A.D. 1963, certain proceedings were had, and orders made and entered of record by said Court, among which is the following, viz:

* * (Caption No. 11713)

On this day came again the said parties, and the Court having diligently examined and inspected, as well the record and proceedings aforesaid, as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, finds that neither in the record and proceedings aforesaid, nor in the rendition of the orders aforesaid, is there anything erroneous, vicious or defective, and that in said record there is no error.

Therefore it is considered by the Court that the orders aforesaid be affirmed in all things, and stand in full force and effect, notwithstanding the said matters and things therein assigned for error. And it is further considered by the Court that the said appellees recover of and from the said appellants, their costs in this behalf expended, to be taxed, and that they have execution therefor.

State of Illinois
Appellate Court
Third District—ss:

I, Julius R. Richardson, Clerk Pro Tempore of the Appellate Court in and for the said Third District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the record of said Appellate Court in the case of Lester Webster, et al, appellants vs. Midland Electric Coal Corporation, a corporation, et al, appellees, now of record in my said office.

(Seal) In Testimony Whereof, I hereunto set my hand and affix the Seal of said Appellate Court, at Ottawa, this 16th day of April, in the year of our Lord one thousand nine hundred and sixty-four.

/s/ Julius R. Richardson
Clerk Pro Tempore Appellate Court
Third District of Illinois